U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 July 2007

CASE NO.: 2006-LHC-00905

OWCP NO.: 15-46088

In the Matter of:

F. D.,
Claimant,

vs.

ARMY CENTRAL INSURANCE FUND / NAF PERSONNEL DIVISION,
Employer,

and

BROADSPIRE,
Carrier.

Appearances: Steven M. Birnbaum, Esquire,
For the Claimant

William N. Brooks II, Esquire,
For the Employer/Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND DENYING SECTION 14(e) PENALTIES

INTRODUCTION

This is an action filed by the Claimant for benefits under the Longshore and Harbor Workers' Compensation Act ("Act"), 33 U.S.C. §§ 901 *et seq*. (2006), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73 (2006), for an injury he sustained while working for Army Central Insurance Fund / NAF Personnel Division, the Employer. It was initiated with the Office of Administrative Law Judges ("OALJ") on

March 1, 2006, when it was referred to the OALJ for formal hearing by the District Director of the Office of Workers' Compensation Programs.

For the reasons set forth below, the Claimant is awarded temporary partial disability and medical benefits. His petition for Section 14(e) penalties is denied.

PROCEDURAL BACKGROUND

This matter was heard in San Francisco, California, on November 6, 2006. The Claimant and counsel for all parties appeared and participated in the hearing. At the hearing, ALJ Exhibits ("ALJ") 1-4 were admitted, as were the Claimant's Exhibits ("CX") 1-12, and the Respondents' Exhibits ("EX") 1-15. After the hearing was concluded, the Claimant and Respondents submitted post-hearing statements on January 8, 2007.

ANALYSIS AND FINDINGS

Issues

The issues to be decided in this case include the following:

1. When did the Claimant reach maximum medical improvement with respect to his left shoulder injury?
2. What is the nature and extent of the Claimant's disability with respect to his left shoulder injury?
3. Did the Claimant's right shoulder injury arise out of and in the course of employment?
4. When did the Claimant reach maximum medical improvement with respect to his right shoulder injury?
5. What is the nature and extent of the Claimant's disability with respect to his right shoulder injury?
6. What was the Claimant's average weekly wage ("AWW") at the time of his injury?
7. For what disability benefits are the Respondents liable?
8. For what medical expenses are the Respondents liable?
9. Did the Claimant provide timely notice of his alleged right shoulder injury under Section 12 of the Act?
10. Did the Claimant file a timely claim for benefits for his alleged right shoulder injury under Section 13 of the Act?
11. Is the Claimant entitled to Section 14(e) penalties?

Stipulations

The parties have stipulated to the following:

1. This matter falls under the jurisdiction of the Nonappropriated Fund Instrumentalities Act extension to the Longshore and Harbor Workers' Compensation Act.

2. The Claimant and Employer were in an employer-employee relationship at the time of left shoulder injury.
3. The Claimant suffered an injury to his left shoulder on June 4, 2002.
4. The Claimant suffered an injury to his right shoulder.
5. The injury suffered to the left shoulder was work-related, and arose out of and in the course of employment with the Employer.
6. The claim for the Claimant's left shoulder injury was timely noticed.
7. The claim for the Claimant's left shoulder injury was timely filed.
8. The Claimant is entitled to disability compensation for his left shoulder injuries.
9. The Claimant is entitled to medical benefits for his left shoulder injuries.
10. The Employer has paid for reasonable and necessary medical care and treatment for the Claimant's left shoulder injuries.
11. Currently, the Employer is not paying the Claimant compensation for either of his shoulder injuries.
12. Currently, the Employer is only paying medical benefits for the Claimant's left shoulder injuries, but not for his right shoulder.
13. The Claimant has outstanding medical bills.
14. The Claimant no longer works in his former job.
15. The Claimant is currently working in an alternative job.
16. The Claimant's AWW is to be calculated under Section 10(a).
17. The Employer is not seeking Special Fund relief.
18. The Claimant's shoulder injuries are unscheduled injuries.
19. Dr. Yap is the Claimant's authorized treating physician for this injury.

Factual Background

The Claimant was born in Wisconsin in 1963 and completed his General Education Development degree ("GED") in 1982. (HT, p. 27; RX 14, p. 84.) From 1985 to 1989, he served as a helicopter mechanic in the United States Army. (HT, p. 28.) There, the Claimant performed overhead work[1] maintaining helicopter rotor blades. (RX 14, p. 100.) He was honorably discharged from the military after suffering an injury to his left knee in a work-related accident. (HT, p. 28; RX 14, pp. 83, 100.)

Following his military service, the Claimant worked in several jobs involving physical activity. He was a trailer mechanic from 1989 to 1991, which required overhead activity beneath semitrailers. (RX 14, pp. 98-99.) From 1991 to 1999, the Claimant worked as a mail processor for the United States Post Office ("Post Office"), which entailed sorting mail with automated machines and moving carts through the facility. (RX 14, pp. 98, 128.) In January 1998, he sought treatment at the Clarksville Memorial Hospital Emergency Room for pain in his right shoulder and scapula related to working at the Post Office the night before.[2] (RX 9, pp. 45-46.) The Claimant next worked for a few months mounting tires at Sears Automotive ("Sears"). He

[1] Overhead work is performed with one's arms stretched above the shoulders.

[2] When questioned on cross-examination about the hospital's records of this incident, the Claimant could not remember injuring his right shoulder at that time. He acknowledged suffering generally from neck and other pains while working at the Post Office but attributed such ailments to a car accident in 1985. (HT, pp. 77-79.)

performed his work — including manually removing, balancing, and installing tires — at a chest-high level. (RX, pp. 96-97.) In June 2000, the Claimant strained his left shoulder while working for Sears.[3] (RX 12, pp. 70-71.)

Shortly thereafter, the Claimant relocated to Hawaii and began working in a civilian capacity for the Army / Nonappropriated Fund ("NAF"). (RX 14, pp. 91-92.) NAF first employed the Claimant in the Schofield Barracks Automotive Center where he advised soldiers how to fix their personal vehicles. (RX 14, pp. 94-95.) He did not perform any physical labor in this position. (RX 14, p. 95.) After three months, the Claimant transferred to NAF's Kalakaua Golf Course ("Kalakaua") to maintain heavy equipment utilized on the grounds. (HT, pp. 28-29; RX 14, p. 92.) This job regularly involved lifting pieces of equipment weighing from 50 to 150 pounds and performing overhead work. (HT, p. 29; RX 14, p. 94.) The Claimant also used wrenches with both his right and left hands to tighten and loosen bolts. (HT, pp. 36-37.)

On June 4, 2002, the Claimant injured his left shoulder while working at Kalakaua. As he lifted an approximately 70-pound lawn mower reel onto a waste-high workbench with both hands, the Claimant heard a "pop" and felt a sharp pain in his left shoulder. (HT, p. 29.) Dr. Robert Sussman treated him that day for a strained left shoulder and limited the Claimant to light duty work. (CX 1, p. 1.) The Claimant remained on light duty, performing office and paperwork tasks, until late September 2002. (HT, pp. 30-31; RX 14, p. 105.)

A magnetic resonance image ("MRI") performed on July 18, 2002, indicated that the Claimant suffered a left rotator cuff tear. (RX 7, p. 15.) On September 23, 2002, he underwent his first arthroscopic surgery to repair the torn rotator cuff. (RX 7, p. 18.) Although he had remained on light duty up until his surgery, the Claimant did not return to employment at Kalakaua after this first surgery. (HT, p. 31.) He received $29,783.14 in wages for the last year of his employment. (RX 13, p. 73.) NAF began voluntarily paying total temporary disability ("TTD") on October 11, 2002, based on an AWW of $572.75. (RX 4, p. 6.)

Beginning approximately December 19, 2002, the Claimant complained of increased pain and decreased range of motion in his post-operative left shoulder. (RX 7, p. 22.) About this time, he began feeling "twinges," or a self-described slight pain associated with certain movements in his right shoulder. (HT, pp. 31-33.) He did not remember feeling such "twinges" in his right shoulder before the June 4, 2002, left shoulder injury. (HT, p. 38.) An MRI performed on January 10, 2003, revealed that the Claimant's left rotator cuff repair was intact and stable but that his left deltoid muscle had ruptured. (RX 7, pp. 22, 24.) The Claimant underwent a second surgery to repair the left deltoid muscle on February 10, 2003. (RX 7, pp. 24-25.) He also underwent physical therapy three days per week, for one to two hours per day, before and after both surgeries. (RX 14, p. 106.)

[3] On cross-examination, the Claimant denied straining his left shoulder while working at Sears. (HT, pp. 54-55). He admitted to suffering from a neck injury at that time, despite the Respondents' evidence of a Workers' Compensation claim explicitly identifying a "left shoulder strain" as his injury. (HT, p. 54; RX 12, pp. 70-71.) The Respondents also introduced into evidence a report prepared in August 2003 by Sears's carrier, Liberty Mutual Insurance, contending that the Claimant "was taking a tire off a vehicle and as he picked the tire up he felt his left shoulder pop" at the time of his June 2000 Workers' Compensation claim. (RX 12, p. 72.) The Claimant denied the accuracy of this description as well. (HT, p. 54.)

In March 2003, the Claimant and his family relocated to Michigan, where he received treatment for his shoulder at the Valley Medical Center ("VMC") in Flint, Michigan. That month, he visited Dr. John Yap, an orthopedic surgeon, and received ongoing physical therapy. (HT, pp. 66-67; RX 14, pp. 106-07.) Following an MRI performed on August 11, 2003, Dr. Yap diagnosed the Claimant with a persistent partial left rotator cuff tear. (CX 4, pp. 30-31; RX 8, pp. 30-31.) Dr. Yap performed a third and final surgery on the Claimant's left shoulder on October 22, 2003, to repair the partial tear. (CX 4, p. 35; RX 14, p. 32.)

After the third surgery, Dr. Yap conducted periodic follow-up examinations on the Claimant and noted some improvements in his left shoulder, including successful healing of the surgical wound, reduced pain, and slowly increasing range of motion. Dr. Yap also prescribed an ongoing course of physical therapy. (CX 4, pp. 39-40, 47, 53, 57-58, 60-61, 63; RX 8, pp. 34-39.) On July 27, 2004, he recommended the Claimant for vocational retraining and rehabilitation. (CX 4, p. 59; RX 8, p. 40.) Surmising that the Claimant's discomfort and reduced left shoulder strength would be permanent, Dr. Yap restricted the Claimant from performing repetitive overhead work or lifting objects weighing more than 10 pounds in his future employment activities. (CX 4, p. 59; RX 8, p. 40.) Dr. Yap found the Claimant's left shoulder at maximum medical improvement ("MMI") on November 23, 2004. At this time, he noted a painful "clicking" in the Claimant's left shoulder, ongoing but tolerable tenderness and discomfort in the affected region, and improving arm strength. (CX 4, p. 62; RX 8, p. 43.)

The Claimant experienced increasing pain and more frequent "twinges" in his right shoulder while continuing to receive treatment for his left shoulder. (HT, p. 33.) He especially noticed discomfort in his right shoulder when lifting objects. (HT, p. 33.) In mid-2003, he began to associate this pain with increased use of his right arm to compensate for the ineffective left arm. (HT, pp. 38, 57-59.) Before June 2005, the Claimant never reported these "twinges" to any of his treating physicians or to his employer on S-203s filed in May and July of 2004. (HT, pp. 58-59.) Physical examinations of the Claimant's right shoulder performed on May 10 and December 1, 2004, at VMC further revealed no crepitation, contracture, dislocation, impaired range of motion, or abnormal movements. (CX 4, p. 64; RX 10, pp. 49, 53.)

In late May 2005, the Claimant felt his right shoulder "pop" and experienced significant pain while lifting a partially filled milk container weighing approximately six pounds. A few days later, he again strained his right shoulder while swatting flies. (HT, pp. 33-35, 68.) A June 13, 2005, physical examination conducted at VMC revealed positive crepitance and reduced range of motion. (CX 5, p. 72; RX 10, p. 56.) On June 14, 2005, the Claimant told a treating physical therapist that he had dislocated his right shoulder while lifting the milk jug and subsequently pushed it back into place a day later.[4] (CX 8, p. 80; RX 10, p. 60.) Finally, a June 22, 2005, MRI revealed a complete right rotator cuff tear. (CX 6, p. 76; RX 10, p. 61.)

Dr. Yap examined the Claimant's right shoulder on July 12, 2005. (CX 7, p. 79; RX 8, p. 44.) He had the MRI report of the torn rotator cuff but not the actual image itself for his diagnosis. (CX 7, p. 79; RX 8, p. 44.) Dr. Yap's own x-rays confirmed a right rotator cuff

[4] The Claimant testified that he was not sure if he had in fact dislocated his right shoulder, only that it felt as he would imagine a dislocated shoulder feels like and that he then pushed it back into place. (HT, pp. 74-75.) Dr. Stoker of VMC also noted no signs of dislocation when he evaluated the Claimant on June 13, 2005. (CX 5, p. 73; RX 10, p. 57.)

injury and also revealed chronic impingement and tendonitis requiring surgical correction. (CX 7, p. 79; RX 8, p. 44.) Dr. Yap described the Claimant's injury as a "new problem," which he believed had occurred prior to June 2005. (CX 7, p. 79; RX 8, p. 44.) He analogized the Claimant's current right shoulder problems to his earlier left shoulder injury and characterized it as "longstanding perhaps from years ago and perhaps with a different type of injury." (CX 7, p. 79; RX 8, p. 44.) He further opined, "It would not surprise me in the least bit if the right shoulder discomfort and the rotator cuff problems are linked to his employment during the military services." (CX 7, p. 79; RX 8, p. 44.) Dr. Yap's treating reports and letters used the term "military service" exclusively when referring to events occurring during the Claimant's employment at Kalakaua. (CX 4, pp. 21, 59; RX 8, pp. 27, 40.) He did not use the term in those reports to refer to the Claimant's earlier Army enlistment as a helicopter mechanic. (CX 4, pp. 21, 59; RX 8, pp. 27, 40.)

On January 5, 2006, Broadspire filed an LS-207 controverting the Claimant's contention that his right shoulder injury was related to his compensable left shoulder injury. (RX 5, p. 9.) After an October 3, 2006, exam, Dr. Yap reiterated the Claimant's need for surgical intervention to improve his right shoulder. (CX 10, p. 93.) As of trial, the Claimant continued to suffer from constant, daily pain and still anticipated undergoing remedial surgery. (HT, pp. 51-52.)

In 2004, the Claimant entered a Department of Labor ("DOL") vocational training program and, as of the November 6, 2006, hearing, had almost completed an Associate's Degree in Applied Sciences. (HT, pp. 39-41.) In June 2006, he took an unpaid internship as a draftsman using computer-aided designing ("CAD") software at Owosso Automation ("Owosso"), a machining and fabrication shop. (HT, pp. 41-42.) Owosso hired the Claimant as a paid employee on September 10, 2006, even before he had completed his degree. (HT, pp. 43-45.) His first pay stub for a full pay period indicated that the Claimant received $11.00 per hour and worked 40 hours per week at Owosso. (CX 11, p. 94.) On September 21, 2006, Broadspire filed an LS-207 notifying the Claimant that his TTD payments were being suspended because he had returned to work. (RX 5, p. 10.) Broadspire simultaneously filed an LS-208 in conjunction with its last payment of benefits. (RX 6, p. 13.)

The Claimant's Left Shoulder Injury

The Claimant's Left Shoulder Injury Reached MMI on November 23, 2004.

The determination of when MMI is reached is primarily a question of fact based on medical evidence, not economic considerations. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60-61 (1985). However, a date of permanency may not be based upon a physician's mere speculation. *See Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439, 441 (1976) (rejecting as too speculative a physician's statement that he "supposed" he could project the claimant's disability rating to determine the injury's permanency). Furthermore, the date that an employee returns to work is irrelevant to determining when a claimant reached MMI. *Thompson v. McDonnell Douglass Corp*., 17 BRBS 6, 9 (1984).

The Claimant asserts that the date he reached MMI with respect to his left shoulder injury should be determined as of September 10, 2006, the date he returned to gainful employment at Owosso. (HT, p. 45.) The Claimant suggests this date based upon the Respondents' payment of

TTD benefits up until his reemployment at Owosso and the Respondents' pre-hearing statement acknowledging that his left shoulder injury left him "totally disabled" from September 19, 2002, to September 10, 2006. (ALJ 3, p. 2.)

The Respondents contend that the Claimant's left shoulder injury reached MMI on November 23, 2004, the date Dr. Yap reported the Claimant had "hit maximum medical improvement." In his post-treatment report on that date, Dr. Yap "released" the Claimant from a medical standpoint while not expecting further improvements in his left shoulder. (CX4, p. 62; RX 8, p. 43.)

Since medical facts, not economic considerations, determine the date an employee reaches MMI, I find that the Claimant reached MMI for his left shoulder injury on November 23, 2004. *Trask*, 17 BRBS at 61. Dr. Yap's reports as the treating physician are unequivocal when concluding that the Claimant could not expect to achieve any further medical improvement in his left shoulder. (CX 7, p. 79; RX 8, p. 44.) Despite ongoing pain and persistent reduced range of motion in the left shoulder, there is no evidence in the record indicating that the Claimant sought or received further treatment for this particular injury after November 23, 2004. This confirms that Dr. Yap's determination of MMI was more than mere speculation. *Steig*, 3 BRBS at 441.

The Respondents continued to pay TTD benefits after November 23, 2004, only because the Claimant participated in a DOL vocational rehabilitation program. Such economic considerations, in light of Dr. Yap's medical conclusions, are irrelevant to determining the date of MMI. *Trask*, 17 BRBS at 61; *see also McDonnell Douglass*, 17 BRBS at 9. Nevertheless, the Claimant is correct in arguing that whether the MMI date is determined at November 23, 2004, or September 10, 2006, is irrelevant. The Respondents had not established that the Claimant was capable of performing suitable alternative employment between his reaching MMI and returning to work at Owosso. Since the Claimant's wage-earning capacity was effectively zero, the monetary value of his disability benefits would be the same — two-thirds his pre-injury wages — whether his injury was considered temporary or permanent during that period. 33 U.S.C §§ 908(b), (c)(21).

The Claimant's Left Shoulder Injury is a Permanent Partial Disability.

The Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical impairment to receive a disability award. *Sproull v. Stevedoring Serv. of America*, 25 BRBS 100, 110 (1991). Section 8 of the Act identifies four categories of injuries and specifies different methods for calculating disability benefits under each, based upon whether an injury is temporary or permanent and whether it is partial or total. 33 U.S.C § 908.

There are two tests to determine whether an injured worker's impairment is temporary or permanent. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122-23 (1988). Under the first test, a residual disability will be considered permanent if and when the employee's condition reaches the point of MMI. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Under the second test, a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in

which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

The degree of disability determines whether a disability is partial or total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990). A disability is total only if 1) the claimant demonstrates that the work-related injury in question renders him unable to return to prior employment, and 2) the employer subsequently fails to establish the availability of suitable alternative employment. *General Constr. Co. v. Castro*, 401 F.3d 963, 968-69 (9th Cir. 2005). Once the employee has shown that he cannot return to his usual employment, the employer bears the burden of demonstrating suitable alternative employment. *Id.* at 969. A showing of realistically available job opportunities must consider the claimant's location, age, education, work experience, and physical restrictions. *Id*. Thus, if the claimant is capable of gainful employment, the disability is partial. *Id*. The claimant does not have the burden of showing a lack of available suitable employment. *See Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585, 591 (1981).

The parties have stipulated that the Claimant suffered a left shoulder injury on June 4, 2002, and that he is entitled to disability compensation for this injury. He had been unable to work as a result of this injury for over four years, which demonstrates both a physical and economic impairment necessary to receive compensation. *Sproull*, 25 BRBS at 110. Indeed, the Respondents had been paying TTD until the Claimant returned to gainful employment on September 10, 2006. Furthermore, the medical evidence supports and the parties agree that the Claimant has achieved MMI for his left shoulder injury. Thus, under the first test determining the nature of that injury, I find that the Claimant reached a state of permanence with respect to his left shoulder injury on November 23, 2004. *James*, 22 BRBS at 274.

Due to residual left shoulder pain and reduced range of motion following his three rotator cuff surgeries, which preclude him from performing the strenuous physical requirements of equipment maintenance, he has been unable to return to his prior employment at Kalakaua. *Castro*, 401 F.3d at 968. The Claimant's inability to return to his prior job renders him totally disabled. *Id.*

The burden then shifts to the Respondents to show that the Claimant is no longer totally disabled. *Id*. at 969. They must provide evidence of realistically available jobs, suitable to the Claimant's skills and medical limitations, to prove he is presently partially disabled. *Id*. However, the Respondents have proffered no such vocational evidence on their own. Although the Claimant has recently returned to work, the Respondents argue that they need more time to evaluate whether this is suitable alternative employment. That in itself could entitle the Claimant to continuing total disability benefits because the Respondents failed to produce evidence to meet their burden. *Shell*, 14 BRBS at 585. Nevertheless, the Claimant, on his own accord, has demonstrated his capability to gain suitable alternative employment: he has nearly completed a DOL vocational rehabilitation program and successfully interned with his current employer, Owosso. (HT, pp. 39-42.) Since the Claimant's complications and medical restrictions stemming from his left shoulder injury prevent him from returning to his prior employment as a mechanic and his recent hiring at Owosso constitutes gainful employment, the Claimant's once total disability with respect to his left shoulder now constitutes a partial disability. *Castro*, 401

F.3d at 969. Thus, I find that the Claimant's disability became partial as of September 10, 2006, the date he returned to gainful employment at Owosso.

The Claimant's Right Shoulder Injury

The Claimant Has Made a Prima Facie *Case to Invoke the Section 20(a) Presumption that His Right Shoulder Injury Arose Out of and In the Course of Employment.*

Section 20 of the Act provides that a claim for compensation is presumed to fall within the Act absent substantial evidence to the contrary. 33 U.S.C § 920(a). To establish a claim for compensation, a claimant must prove a *prima facie* case that 1) he sustained physical harm or pain, *Murphy v. SCA / Shayne Bros.*, 7 BRBS 309, 314 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and 2) that working conditions existed or an accident occurred in the course of his employment which could have caused the harm, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 330-31 (1981). If the claimant alleges that a work-related accident caused his injury, he must prove that the alleged accident occurred. *Id*. Similarly, if the claimant alleges that working conditions caused his injury, he must prove that the alleged working conditions existed by proving the exposure, event, or episode that led to the injury actually occurred. *Id*. at 331. Once the claimant has established that he has suffered an injury and that the alleged accident or working conditions in fact existed, the presumption serves as a causal connection to link the harm with the injured employee's employment. *Id.* A possible intervening accident does not bar invoking the presumption. *James*, 22 BRBS at 273 (affirming the presumption where the claimant reinjured his back in a non-industrial accident while convalescing from a previous work-related back injury). Merely proving the existence of a physical impairment is insufficient to satisfy the claimant's burden of proof. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). The claimant must actually allege facts that would establish that he suffered an injury arising in the course of employment. *Id.* at 616. However, the claimant only needs to produce "*some* evidence tending to establish" both elements to invoke the presumption, and the causation evidence need not be weighed. *Brown v. I.T.T. / Continental Baking Co*., 921 F.2d 289, 296 n. 6 (D.C. Cir. 1990) (emphasis in original).

As to the first element of the *prima facie* case, the parties have stipulated that the Claimant suffered a right shoulder injury, and the MRI results show a rotator cuff tear. (CX 6, p. 76; RX 10, p. 61.) As to the second element, the Claimant asserts that Dr. Yap's medical reports in conjunction with the Claimant's testimony show a causal link between his left and right shoulder injuries. (HT, pp. 31-33, 38.) In support, the Claimant emphasizes Dr. Yap's opinion that the right shoulder injury pre-dated the June 2005 milk jug and mosquito swatting incidents, as well as Dr. Yap's supposition that the right rotator cuff tear was a "longstanding" condition linked to the Claimant's employment with NAF. (CX 7, p. 79; RX 8, p. 44.) The Claimant asserts that these medical conclusions corroborate his personal associations of increasing right shoulder pain while overcompensating for his left shoulder injury. (HT, pp. 33, 38, 57-59.) Accordingly, the Claimant maintains that for the right shoulder injury to occur independently from the left shoulder injury would prove a "highly improbable coincidence."

The Respondents assert that the Claimant must prove both prongs of the *prima facie* case by a preponderance of the evidence since he is not entitled to the presumption as a matter of course. They cite several cases applying rules similar to the *Kelaita* decision. *Devine v. Atlantic*

Container Lines, G.I.E., 25 BRBS 15 (1990) (finding that the presumption applied to link the harm suffered and the course of employment where the claimant had established that 1) he was injured and 2) working conditions capable of causing injury existed); *Murphy*, 7 BRBS 30 (1977) (holding that there is no presumption of a work-related injury where the claimant had not proven an injury occurred); *see also Kelaita*, 13 BRBS 326. Also, when addressing the Claimant's *prima facie* case, the Respondents imply that the Claimant has not proven by a preponderance of the evidence a causal connection between his right shoulder injury and either lifting the mower reel, overcompensating for his left shoulder injury, or working at Kalakaua in general.

I find that the Claimant has satisfied his *prima facie* case under the Act by producing sufficient evidence to establish the required Section 20(a) elements. The parties have stipulated that he has suffered a right shoulder injury, and the first element of the *prima facie* case is not at issue. As to the second element of whether an accident or conditions existed that could have caused the injury, the uncontested record shows that the Claimant performed overhead work and heavy lifting while employed at Kalakaua, particularly on June 4, 2002, when he undisputedly injured his left shoulder. (HT, p. 29; RX 14, p. 94.) Dr. Yap's report stating that the right shoulder injury occurred years before his right rotator cuff tear diagnosis and possibly arose out of his NAF employment leaves open the medical possibility that the Claimant's accident lifting the mower reel and his subsequent overcompensation during recovery contributed to this ailment. (CX 8, p. 79; RX 8, p. 44.) Lastly, the Claimant testified that he associated his gradual onset of pain and discomfort in his right shoulder with his post-left shoulder injury condition. (HT, pp. 33, 38, 57-59.)

Although the aforementioned evidence, even in the aggregate, is not dispositive in making a causal connection between the Claimant's injury and his employment, I find that the available facts satisfy the minimal evidentiary requirements to establish a *prima facie* case that the injury *could* have resulted from the events of and following the June 4, 2002 accident.[5] *Kelaita*, 13 BRBS at 330-31. The Claimant has alleged sufficient facts describing the general working environment, his doctor's professional medical opinion, and his own subjective assessment that combine to make a plausible, but not proven, case that he suffered an injury arising in the course of employment. *U.S. Industries*, 455 U.S. at 616.

In their arguments refuting the *prima facie* case, the Respondents would have me weigh the evidence. However, the presumption does not require weighing the causal connection. *Brown*, 921 F.2d at 296 n. 6. At this juncture, I need only find that the Claimant has suffered an injury and that conditions existed conducive to causing such injury. *Kelaita*, 13 BRBS at 331. The Claimant's working environment was physically strenuous, and his treating physician has diagnosed a prolonged right shoulder ailment dating as far back as the left shoulder injury. Furthermore, the Claimant testified to experiencing right shoulder pain which he personally

[5] The Claimant's post-hearing brief is admittedly confusing when discussing just how the left-shoulder injury and accident are related to the right shoulder injury. Mindful of the Supreme Courts admonition against "envisioning" claims the Claimant has not made, *see U.S. Industries*, 455 U.S. 615-16, I note that the Claimant is far clearer in his brief when discussing timely filing and notice that his theory is that the right shoulder injury is a consequence of overuse following the left shoulder injury. Therefore, I am not creating a claim that the Claimant has not raised but merely adhering to the Claimant's own arguments stated succinctly in his later discussion of Sections 12 and 13 of the Act.

associated with his left shoulder injury. That lifting a six-pound milk jug or swatting mosquitoes could have discretely caused his right shoulder condition does not bar invoking the presumption. (HT, pp. 33-35); *James*, 22 BRBS at 274. The Claimant's increased reliance on his right arm as a direct and necessary consequence of his left shoulder injury could have made him more susceptible to tearing his right rotator cuff while performing such everyday tasks. Thus, his current right shoulder injury *could* be causally linked to overcompensating for his injured left shoulder. Therefore, the theory that overcompensating for the left shoulder led to the injured right shoulder satisfies the Claimant's burden of proof by not only proving the existence of a physical impairment but also producing a possible causal mechanism. *U.S. Industries*, 445 U.S. at 615.

The Respondents Failed to Rebut the Claimant's Prima Facie *Case, and Therefore, There is No Need to Weigh All the Evidence in the Record.*

Once a claimant establishes a *prima facie* case, a presumption is invoked under Section 20(a) of the Act that the claimant's injury arose out of the claimant's employment, and the burden shifts to the employer to rebut the presumption by substantial evidence. 33 U.S.C. § 920(a). "Substantial evidence" is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion and is an evidentiary standard that is less than a preponderance of the evidence. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991). To overcome the presumption, the employer must produce facts, not mere speculation, showing that the "injury is *not* casually related to the claimant's employment." *Solberg v. U.S. Navy Resale Sys.*, 13 BRBS 158, 160 (1980) (finding that the administrative law judge's ("ALJ") decision to discredit medical testimony as to causation did not itself constitute rebuttal evidence establishing that the claimant's rotator cuff tear was *not* causally related to her employment) (emphasis in original). The employer has a burden of production but not persuasion. *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 819 (7th Cir. 1998) (affirming the ALJ's findings that equivocal, speculative, and qualified medical conclusions dismissing the decedent's employment as a cause of death did not satisfy the employer's burden of producing substantial rebuttal evidence).

If the employer prevails, the presumption "falls out of the case" and the ALJ must resolve the issue by weighing all of the evidence in the record. *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof rests upon the Claimant. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

The Claimant contends that the Respondents have failed to meet the minimal standard of substantial evidence necessary to rebut the *prima facie* case by failing to controvert a causal relationship between his injury and his job. He argues that the Respondents cannot suggest an alternative, non-industrial explanation for his injury without any proof of its accuracy. *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980) (finding insufficient evidence to overcome the presumption where the medical condition was poorly understood, expert testimony could not conclusively dismiss the injury as work-related, and the respondent's only alternative causal suggestion was that the injury occurred spontaneously). Furthermore, he argues that the Respondents cannot merely rely on alleged contradictions in the Claimant's testimony to rebut the presumption. *Webb v. Corson & Gruman*, 14 BRBS 444, 447-48 (1981)

(finding that discrediting the claimant's testimony did not constitute substantial evidence proving his injuries could not have resulted from a work-related fall).

The Respondents offer circumstantial evidence, which, they argue, constitutes a "specific and comprehensive" rebuttal to the presumption. *See Swinton v. J. Frank Kelly Inc.*, 554 F.2d 1075, 1083 (D.C. Cir. 1976) ("[T]he statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."), *cert. denied* 429 U.S. 820 (1976). They argue 1) that Claimant made no reference to a right shoulder injury for almost three years following the June 4, 2002, incident, 2) that physical examinations on May 10, 2004, and December 1, 2004, revealed no right shoulder problems, and 3) that the milk jug and mosquito swatting incidents were sufficient to dislocate the Claimant's shoulder and cause bruising. They contend that the combined circumstantial evidence provides an alternative explanation for the Claimant's right shoulder injury, mainly that the non-industrial milk jug and mosquito swatting events caused his current condition. The Respondents also suggest that Dr. Yap's medical evaluations are unreliable because the Claimant did not tell him about the milk jug incident and supposedly dislocated shoulder. Furthermore, the Respondents argue that Dr. Yap's medical opinion rebuts the presumption because he dates the right shoulder injury to "years ago," possibly attributable to Claimant's Post Office job in 1998 or his "military service" several years earlier. (CX 7, p. 79; RX 8, p. 44.)

Nevertheless, the Respondents have failed to proffer facts that would constitute substantial evidence to sever the causal relationship between the Claimant's overcompensation for his previous left shoulder injury and his current right shoulder injury. *Solberg*, 13 BRBS at 160. Relying upon *Swinton*, they have produced speculation and circumstantial evidence to suggest alternative mechanisms for the Claimant's injury without sufficiently rebutting the presumed link between his right shoulder injury and work-related accident. 554 F.2d at 1083; *see also Solberg*, 13 BRBS at 160.

In *Swinton*, as is the case here, the D.C. Circuit found that the respondents had produced no medical evidence that could support an alternative causality or prove that the Claimant's work-related incident did not cause or aggravate his injury. 554 F.2d at 1083. Likewise, the Respondents have offered no expert medical testimony of their own, although such evidence is unnecessary under the law. However, they assert that the milk jug and mosquito swatting incidents were possible supervening causes of the Claimant's injury without providing any expert testimony, beyond their own lay suppositions, that such incidents could cause a rotator cuff tear. (HT, pp. 33-35, 68.) They contend that the lack of documented complaints or positive physical evaluations for right shoulder dysfunction prior to June 2005 indicate that the Claimant's current problems could not have resulted from his earlier accident, yet they provide no credible testimony that such complaints and symptoms would be expected or usual for an overcompensation-type injury. (CX 4, p. 64; RX 10, pp. 49, 53.)

The Respondents' attempts to discredit the Claimant's testimony and Dr. Yap's summations are futile. Contradictions in the testimony do not prove with substantial evidence that the Claimant's injury was not work-related. *Webb*, 14 BRBS at 447-48. Even if the Claimant previously injured his right shoulder while employed by the Post Office, the Respondents have proffered no evidence that this would have precluded or conclusively

dismissed a subsequent work-related injury. (RX 9, pp. 45-46); *Parson*s, 619 F.2d at 41. Even if the Claimant felt no pain and suffered no physical symptoms prior to June 2005, contradicting his own testimony, the Respondents have failed to offer testimony or documentation tending to show that this negative evidence severs the possible causal relationship between his right shoulder injury and employment at Kalakaua. (HT, p. 33; CX 4, p. 64; RX 10, pp. 49, 53); *Parson*s, 619 F.2d at 41. And even if the Claimant had informed Dr. Yap about the milk jug incident and supposed dislocated shoulder, the Respondents cannot show that Dr. Yap would have given a different diagnosis, providing substantial evidence that the right shoulder injury could not have resulted from his work-related incident. (CX 7, p. 79; RX 8, p. 44); *Solberg*, 13 BRBS at 160. Furthermore, the Respondents' have not convinced me that the Claimant actually dislocated his shoulder. Without sufficient medical testimony and because neither Dr. Stoker nor Dr. Yap diagnosed a dislocated right shoulder in any of their medical reports, I tend to believe that the Claimant's description to his physical therapist constituted a layperson's self-diagnosis and not a medical opinion. Since the Respondents have failed to offer reliable evidence suggesting that a dislocation proves the Claimant's right shoulder injury could not be work-related, a determination either way is inconsequential. *Parsons*, 619 F.2d at 41; *Solberg*, 13 BRBS at 160; *see also Container Stevedoring*, 935 F.2d at 1546.

The Respondents' final efforts to suggest alternative explanations based on Dr. Yap's medical report are insufficient as rebuttal evidence. When Dr. Yap concludes that the injury could have occurred "years ago," that vague statement could just as easily reference 1998, when the Claimant worked for the Post Office, as it might 2002, when he initially injured his left shoulder. (CX 7, p. 79; RX 8, p. 44.) Despite the Respondents' suggestions to the contrary, I find that "military service" refers to the Claimant's civilian employment at Kalakaua, and not his earlier Army enlistment as a helicopter mechanic. Reading these reports in their proper context suggests that Dr. Yap used working "in" and "for" the military interchangeably, but always in connection with the Claimant's time spent in Hawaii where the shoulder injuries occurred. (CX 4, pp. 21, 59; RX 8, pp. 27, 40.) Nevertheless, Dr. Yap's report on its face, without an opportunity to question his opinions and without comparison from independent medical examinations ("IME") initiated by the Respondents, is equivocal and speculative in this context. *See American Grain Trimmers*, 181 F.3d at 819.

Thus, I find that the Respondents have provided only circumstantial evidence that fails to sever a causal connection between the Claimant's injury and his employment. I further find that their pleas to discredit the Claimant and Dr. Yap, as well as Dr. Yap's medical reports attributing the right shoulder injury to an incident "long ago," possibly relating to the Claimant's "military service," do not provide substantial evidence proving that his right shoulder injury could not have been work-related. Therefore, the Respondents fail to rebut the Claimant's Section 20(a) presumption that his compensable injury arose out of his employment. 33 U.S.C. § 920(a). The presumption remains, and I need not further weigh the evidence of a causal link between his previous accident injuring his left shoulder and his current right shoulder ailments. *See Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982).

The Claimant's Right Shoulder Injury Has Not Reached MMI.

As discussed above, determining the date of MMI is primarily a question of fact based on the record's medical evidence. *Trask*, 17 BRBS at 60-61. Here, the record contains no medical

evidence indicating that the Claimant has reached MMI for his right shoulder injury. Furthermore, neither party contends so. As late as October 3, 2006, Dr. Yap noted that the Claimant still suffered from pain and reduced range of motion in his right shoulder. He prescribed surgery for the right rotator cuff tear and dislocated bicep tendon to alleviate the Claimant's condition. (CX 10, p. 93.) Other than a diagnosis, the Claimant has received no medical care for his right shoulder injury and continues to feel constant, daily pain in that extremity. (HT, p. 52.) Since the Claimant's injury has not stabilized and the scant medical evidence suggests surgery could improve his condition, I find that he has not yet reached MMI for his right shoulder injury. *Trask*, 17 BRBS at 60.

The Claimant's Right Shoulder Injury is a Temporary Partial Disability.

Similar to the discussion of the left shoulder injury, a disability is deemed permanent when either the employee's condition reaches MMI or the impairment appears lasting and indefinite in duration. *James*, 22 BRBS at 274; *Watson*, 400 F2.d at 654. A possibility of improvement exists, and, thus, the condition remains temporary if a physician recommends further treatment. *Monta v. Navy Exchange Serv. Command*, 39 BRBS 104, 109 (2005). An injured employee has not reached MMI if surgery is anticipated with a view toward improvement. *Id.* Even if the treatment is ultimately unsuccessful, MMI does not occur until the treatment is complete. *Id.* However, his disability may be permanent if the future surgery is not expected to improve his condition. *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). Thus, permanency is demonstrated if a physician concludes MMI has been reached and surgery is not anticipated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). Regardless of the condition's permanency and scope, the disability is partial if the claimant can return to some gainful employment. *Castro*, 401 F.3d at 969.

The Claimant has neither reached MMI with respect to his right shoulder injury nor is there conclusive evidence to suggest that his current condition is lasting or indefinite. *James*, 22 BRBS at 274; *Watson*, 400 F2.d at 654. Dr. Yap has recommended surgical intervention to treat the affected right shoulder. (CX 7, p. 79; RX 8, p. 44.) His October 3, 2006, diagnosis and treatment plan suggest that further medical care, including surgery, will improve the Claimant's condition. (CX 10, p. 93.) Also, the Claimant intends to undergo surgery. (HT, p. 51.) Despite the Claimant's residual left shoulder problems after three similar surgeries, I find that his right shoulder treatment is still ongoing and that there is an expectation for some post-operative improvement, which render the disability temporary in nature. *Monta*, 39 BRBS at 109; *Phillips*, 21 BRBS at 233; *Kuhn*, 16 BRBS at 48.

The Claimant has demonstrated his capacity to maintain gainful employment as of September 10, 2006, with injuries to his right and left shoulders. (HT, p. 45.) Thus, his right shoulder injury is also a partial disability. *Castro*, 401 F.3d at 969. Additionally, since his right shoulder injury has not reached MMI, it is a temporary partial disability ("TPD").

The Claimant's Entitlement to Disability Benefits

The Claimant's Average Weekly Wage at the Time of His June 4, 2002, Accident was $572.75.

Sections 10(a), 10(b), and 10(c) of the Longshore Act set forth three alternative methods for determining a claimant's average annual earnings. Pursuant to Section 10(d), the claimant's average annual earnings are then to be divided by 52 weeks to arrive at an AWW for calculating disability benefits. 33 U.S.C. § 910. The first method for calculating AWW, found in Section 10(a), applies to an employee who has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986). "Substantially the whole of the year" refers to the nature of a claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that the claimant could have actually earned wages during all 260 workdays of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978).

The parties have stipulated that Section 10(a) is applicable for calculating the Claimant's AWW. Furthermore, they have agreed that, based on his previous year's earnings, his average annual earnings at the time of his June 4, 2002, industrial accident were $29,783.00. (RX 13, p. 73.) Having been employed for approximately two years maintaining golf course equipment for NAF, the Claimant indeed worked for "substantially the whole of the year immediately preceding his injury" in the same type of employment. 33 U.S.C. § 910(a). Dividing his average annual earnings by 52 weeks, the Claimant's AWW was $572.75. 33 U.S.C. § 910(d).

The Claimant's Inflation-adjusted, Post-injury Wage-earning Capacity is $395.92, Reflecting His Current Pay at Owosso.

Wage-earning capacity is an injured employee's ability to command regular income from his personal labor. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989). Section 8(h) mandates a two-prong test to determine wage-earning capacity. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). For the first prong, the ALJ can use the Claimant's actual post-injury earnings to determine post-injury wage-earning capacity if they "fairly and reasonably represent" such capacity. 33 U.S.C. § 908(h). If there is no evidence of actual post-injury wages or if they do not accurately reflect the Claimant's true earning capacity, under the second prong, the ALJ must fix a fair and reasonable wage-earning capacity considering "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances . . . which may affect his capacity to earn wages in his disabled condition . . ." *Id.*

The relevant factors for the ALJ to consider are the same whether determining under the first prong if actual wages are indicative of earning capacity or fixing under the second prong a fair and reasonable alternative earning capacity. *Devillier*, 10 BRBS at 660-61. Factors to consider, in addition to the statutorily mandated nature of the injury, degree of impairment, and usual employment, include but are not limited to the Claimant's age, education, job search efforts, extent of post-injury employment, and reasonable prospects for continuing in such employment. *Id.* at 656. The ALJ must determine a precise dollar amount for wage-earning capacity under either part of the test. *Id.* at 652. This amount should reflect what the injured

Claimant could earn in "the open labor market under normal employment conditions." *Id.* (internal quotations omitted).

The party contending that the Claimant's actual post-injury wages are not representative of his wage-earning capacity has the burden of establishing reasonably alternative employment. *Grage v. J. M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J. M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990). Furthermore, regular and continuous post-injury employment may not be sufficient to demonstrate the Claimant's wage-earning capacity. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1981) (holding that 11 weeks worked in a cyclical industry was insufficient to show the realistic and regular availability of suitable alternative employment to establish wage-earning capacity).

Finally, post-injury wages must be adjusted for wage inflation to represent the Claimant's residual earning capacity at the time of his injury. *Johnston v. Director, OWCP*, 280 F.3d 1272, 1277 (9th Cir. 2002). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, this record contains insufficient evidence of historic wage levels. Accordingly, the necessary adjustment must be made by decreasing the claimant's post-injury wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage ("NAWW") between the date of the claimant's work injury and the date he returned to work. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

The Claimant argues that his current wage of $11.00 per hour or $440.00 per week, adjusted for inflation, fairly and reasonably represents his post-injury wage earning capacity. He emphasizes his voluntary entry into a DOL vocational rehabilitation program and diligent efforts to earn an Associate's Degree and subsequently seek gainful employment as evidence of a good-faith effort to seek comparable employment.

The Respondents counter that the issue of the Claimant's post-injury wage-earning capacity should not be decided at this time. They assert that partial disability benefits were not at issue when the OWCP referred the case to the ALJ, and that this dispute only arose once the Claimant returned to gainful employment, two months prior to the hearing. (ALJ 1.) As such, the Respondents claim that they have not had the time or opportunity to evaluate whether the Claimant's current earnings reflect his post-injury wage-earning capacity on the open labor market.

As I have rejected the Respondents request for a continuance on this issue, I similarly reject their arguments now to delay deciding this issue. There is no relevant case law to support withholding benefits from the Claimant so that the Respondents can evaluate his current earnings capacity. The Respondents contest that the Claimant's current wages do not reflect his current earning capacity, and, thus, they have the burden of establishing a reasonable alternative weekly wage. *Grage*, 21 BRBS at 69. This burden cannot be shifted to the Claimant to demonstrate the resilience of his current wages.

I find that the Respondents have had ample time and opportunity to address their burden. The Claimant has been in a DOL vocational rehabilitation program since 2004. (HT, p. 40.) The Respondents should have anticipated at least the possibility of his return to some form of gainful

employment and the subsequent issue of suitable alternative employment. "[P]ermanent disability" was clearly stated as an issue in the Claimant's LS-18 to which the Respondents refer in their arguments. (ALJ 1, question 6.) They have had since March 2006, when the OWCP referred the case to the ALJ, to gather evidence and have the Claimant evaluated by a vocational expert even before he returned to work. Instead, the Respondents immediately ceased paying TTD in September 2006, after the Claimant returned to work, without showing that this new job reflected suitable alternative employment and that there was no subsequent wage-loss. (RX 5, p. 10.) They first stopped paying TTD benefits on the false premise that the Claimant's job at Owosso was a suitable alternative employment, and then they refused to pay partial disability benefits by arguing that they cannot determine the suitability of the Owosso job, all the while implicitly suggesting it is inadequate — that the Claimant's residual earning capacity is actually higher than his wages at Owosso represent.

Considering the relevant factors such as the Claimant's injury, degree of impairment, previous employment, as well as his return to education, vocational rehabilitation, and post-injury job-related activities, I find that his current wage at Owosso fairly and reasonably represents his post-injury wage-earning capacity. *Devillier*, 10 BRBS at 856. The Claimant's bilateral rotator cuff tears have left him permanently incapable of performing the heavy lifting and mechanical manipulation required by his former job at Kalakaua. (CX 4, p. 59; RX 8, p. 40.) In the pursuit of alternative employment, he received college-level instruction and vocational training specifically in CAD design. He obtained an internship in the field before securing full-time, paid employment. (HT, pp. 39-42.) Thus, the Claimant has been building his current wage-earning capacity for over two years. He has been either interning or working for his current employer for approximately five months of those two years. Therefore, he has demonstrated a diligent effort to obtain gainful employment, as well as reasonable prospects for continuing in such employment. *Devillier*, 10 BRBS at 856. The Respondents have offered no evidence that suggests that the Claimant's apparent regular and continuous employment does not accurately reflect conditions in the open labor market. *Devillier*, 10 BRBS at 652; *Edwards*, 999 F.2d at 1375.

DOL data shows that the NAWW increased from $483.04 on October 1, 2002, to $536.82 on October 1, 2005. U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, NAWW, Minimum and Maximum Compensation Rates, and Annual October Increases (Section 19(f)), at http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (visited June 25, 2006). When adjusted to reflect the changes in the NAWW, the claimant's residual weekly wage earning capacity of $440.00 was equivalent to a weekly wage of $395.92[6] in 2002.

The Claimant is Entitled to Temporary Total Disability Benefits from September 23, 2002, to September 10, 2006, and Temporary Partial Disability Benefits from September 10, 2006 Until He Reaches Maximum Medical Improvement or Not to Exceed Five Years.

If a claimant suffers an initial work-related accident followed by a second injury outside of work that is the "natural and unavoidable" result of the first injury, the employer is liable for

[6] This calculation is arrived at by dividing the claimant's residual weekly wage earning capacity by the inflation factor, or $440.00 ÷ ($536.82 ÷ $483.04) = $395.92.

the entire resulting disability. *James*, 22 BRBS at 273. The claimant is disabled from the moment he suffered the first injury if he is never again able to return to his previous employment. *Port of Portland v. Director, OWCP*, 192 F3.d 933, 937-38 (9th Cir. 1999). The injury is "complete [at the time of the initial accident] in the sense that any exacerbation of the problem occur[s] naturally and unavoidably from that injury." *Id*. at 938 (finding the claimant's subsequent back injury was "irrevocably fixed" the moment he suffered an earlier, causally related knee injury even though he had no manifesting symptoms until at least three years later) (internal quotations omitted). In the case of an accident leading to traumatic injury, the time of disability usually coincides with the time of injury. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1288 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). However, where the claimant suffers unknown injuries and latent disability, compensation is based on when the claimant became aware of his disability, not the time of the accident. *Johnson v. Director, OWCP*, 911 F.2d 247, 249-50 (9th Cir. 1990) (distinguishing from *Black* because the claimant worked intermittently in the same employment with latent and unknown post-accident injuries and the onset of total disability occurred three and a half years after the initial trauma).

First, pursuant to Section 8(b), a temporarily but totally disabled employee is entitled to compensation equal to two-thirds his AWW for the duration of temporary disability. 33 U.S.C. § 908(b). Second, Section 8(e) provides for TPD benefits totaling two-thirds the difference between the Claimant's post-injury wage-earning capacity and his AWW at the time of injury, awarded throughout the continuance of the disability, but not to exceed five years. 33 U.S.C. § 908(e). All compensation is based on a single determination of the AWW for a given injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 150 (1991) (holding that the date of disability for determining AWW would coincide with the date of the claimant's initial work-related back injury if his subsequent non-work-related back injury was found to be the "natural and unavoidable" consequence of the first industrial accident). If a claimant suffers from a disability, which is the "natural and unavoidable" result of an earlier work-related injury, disability benefits are determined based upon his AWW coinciding with the initial industrial accident. *Id.*

In light of my findings above, the Claimant was temporarily and totally disabled between his September 23, 2002, surgery rendering him physically incapable of performing his usual mechanic's duties and September 10, 2006, when he demonstrated his capacity for gainful employment as a CAD designer. Therefore, he is entitled to TTD benefits equaling two-thirds of his AWW of $572.75, or $381.67, during this period. 33 U.S.C. § 908(b).

Furthermore, the Claimant has been partially disabled since returning to work on September 10, 2006, and is thus entitled to wage-loss compensation. *Castro*, 401 F.3d at 969. Although his left shoulder injury has stabilized, leaving him with a permanent residual disability, his right shoulder injury has yet to reach MMI. Thus, for the purposes of calculating current benefits, I consider the Claimant temporarily and partially disabled. *See James*, 22 BRBS at 274.

Based on the Claimant's successful invocation of the Section 20(a) presumption and the Respondent's failure to rebut, it follows that his right shoulder injury is the "natural and unavoidable" consequence of his initial left-shoulder injury. *Id.* After the work-related injury to his left shoulder, the Claimant was left with only one fully functional shoulder with which to carry on all of his daily tasks. (HT, pp. 33, 38, 57-59.) Thus, I find that the injury to the sole

remaining and burdened shoulder that occurred was "natural and unavoidable." The Claimant has been injured and continuously unable to work in his former capacities as a mechanic since the initial accident. (HT, p. 31); *Port of Portland*, 192 F.3d at 937-38. His right shoulder symptoms could have arisen up to three years later, but this precipitating series of injuries was "irrevocably fixed" and "complete" upon the June 2, 2004, industrial accident, despite any subsequent and exacerbating incidents. *Id.* at 938. The Claimant was and has remained disabled as of his initial industrial accident. *Black*, 717 F.2d at 1288. Unlike the claimant in *Johnson*, he has never been able to return to his former employment; thus, his disability was contemporaneous with his accident, not latent. *See* 911 F.2d 250. Therefore, disability compensation for the Claimant's "natural and unavoidable" injury should be based on his AWW as of the June 4, 2002, accident.

Accordingly, the claimant's inflation-adjusted loss of wage earning capacity is $176.83 per week.[7] Under the provisions of Section 8(e) of the Act, upon returning to work on September 10, 2006, and establishing his ability to perform suitable alternative employment, the Claimant became entitled to receive TPD of $116.71 per week.[8] 33 U.S.C. § 908(e). The Claimant is entitled to receive TPD beginning September 10, 2006, and continuing for the duration of his temporary disability with respect to his right shoulder injury, but not to exceed five years. *Id.*

The Claimant's Entitlement to Medical Benefits

Section 7(a) of the Act requires the employer to pay all of an injured employee's reasonably necessary medical expenses depending on the particular type of the injury and course of recovery. 33 U.S.C. § 907(a). When a claimant sustains an injury at work followed by a subsequent injury or aggravation outside work, the employer is liable for all medical expenses arising out of both injuries if the subsequent injury is the "natural and unavoidable" result of the original work injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). A claim for medical benefits is never time-barred. *Id.*

Because of the weight I have given to the Section 20(a) presumption and my findings above that the Claimant's right shoulder non-industrial injury was the "natural and unavoidable" result of his left shoulder industrial injury, he is entitled to all reasonable medical expenses incurred from his left and right shoulder injuries.

The Claimant's Timely Notice of His Right Shoulder Injury Under Section 12

Section 12 of the Act provides that notice of a compensable injury must be given to the Commissioner and the employer within 30 days after the claimant is aware or should have been aware of the relationship between his injury and his employment by exercising reasonable diligence or based on medical advice. 33 U.S.C. § 912(a). Sufficient notice is presumed in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(b); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999) (holding that the Section 20(b) presumption applies to the timely notice of an injury pursuant to Section 12); *see also Kashuba v. Legion Ins. Co.*, 139 F.3d

[7] This calculation is arrived at by subtracting his inflation-adjusted wage-earning capacity from his AWW, or $572.75 - $395.92 = $176.83.

[8] Two-thirds his inflation adjusted wage loss of $176.83.

1273, 1275 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). A claimant is not required to give separate notice of a subsequent injury resulting from an initial injury arising out of and in the course of employment. *Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94, 96 (1988) (upholding the ALJs determination that the Section 20(a) presumption applied to causally link the Claimant's initial work-related ankle injury with his subsequent back injury and therefore did not require separate notice of the back injury).

A claim will not be time-barred if either the employer had notice of the injury or the employer was not prejudiced by the employee's failure to give timely notice. 33 U.S.C. § 912(d). The employer bears the burden of proving by substantial evidence that it has been prejudiced by a lack of timely notice and thus unable to effectively investigate some aspect of the claim. *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 216 (1991) (finding that seven and a half months before a hearing was sufficient time for the employer to investigate a claim and obtain an IME). However, the Ninth Circuit has not required evidence of the employer's failed post-notice attempts to investigate a claim to establish prejudice. *Kashuba*, 139 F.3d at 1276. The employer must produce evidence that a lack of timely notice impeded its ability to determine the nature and extent of the injury, not just conclusory suppositions alleging prejudice. *Id.*

The Claimant contends that timely notice of his right shoulder injury was given because this injury was the "natural and unavoidable" consequence of his left shoulder injury, for which the parties have stipulated timely notice was given. He maintains that his right shoulder injury resulted from overuse made necessary by the unavailability of his injured left shoulder, and not from the more recent, independent milk jug or mosquito swatting incidents. Furthermore, the Claimant attests that he divulged his right shoulder injury to the Respondents at an informal conference with the OWCP in January 2006, approximately seven months after first complaining of right shoulder pain at the VMC. (CX 5, p. 72; RX 10, p. 56.)

The Respondents argue that they did not receive timely notice of his right shoulder injury despite the Claimant's testimony that he began associating right shoulder "twinges" with increased use of his right arm beginning in mid-2003. (HT, pp. 57-59.) They further note that the Claimant did not indicate a right shoulder injury on his S-203s filed in May and July of 2004. (HT, pp. 58-59.) Thus, the Claimant was aware of his injury at least three years prior to giving notice. The Respondents' claim that, by not giving notice of the alleged right shoulder injuries when he first began associating his "twinges" with his injuries, the Claimant's untimely notice has prejudiced their investigation in two ways: 1) they could not fully investigate the perceived lack of documentation evidencing the existence of "twinges," and 2) they could not have known how to rebut the competing claims that the Claimant's right shoulder injury resulted from either the June 4, 2002, motor reel lifting incident, overuse following the left shoulder injury, or the general working conditions at Kalakaua.

I find that the Respondents received timely notice of right shoulder injury pursuant to the stipulated timely notice of the left shoulder injury. Following my Section 20(a) analysis, the Claimant's right shoulder injury was the "natural and unavoidable" consequence of his left shoulder injury, which arose out of and in the scope of employment. *Lockheed Shipbuilding*, 21 BRBS at 96. Due to the presumption that both shoulder injuries are causally related, he was not required to give separate notice of subsequent injuries within the 30-day restrictions of Section 12. *Id.*

Although I find that the Claimant's injury is not time-barred under Section 12, I think it prudent to address the Respondents' claims that they were prejudiced by untimely notice. I am not convinced by the Respondents' assertions that they were unable to fully investigate the Claimant's right shoulder injury and thus so prejudiced. They received constructive notice of the injury as of the January 2006 conference with the OWCP, and their own LS-207 notice of controversion dated on January 5, 2006, indicates that the right shoulder injury was at issue. (RX 5, p. 9.) The Respondents, thereafter, had 10 months before the hearing to investigate the claim and seek an IME. Nevertheless, they have failed to provide substantial evidence of their inability to investigate this claim. 33 U.S.C. § 912(d); *Steed*, 25 BRBS at 216. Although they are not required to show that they have tried and failed to investigate after discovering the injury in 2006, I note the Respondent's have made no effort to do so in the approximately 10 months they had to prepare for this hearing. *Kashuba*, 139 F.3d at 1276.

Still, the Respondents must produce evidence tending to show that a lack of notice has impeded their investigation into the nature and extent of the injury. *Id.* In *Kashuba*, the court found that had timely notice been given before the employee underwent surgery, the employer could have investigated a dubious claim, including contradictory accident dates and causal mechanisms, and participated in the employee's care plan to ameliorate further injury. *Id.* However, in this case, the Respondents have not asserted that, had they known sooner about the Claimant's injuries, they could have obtained evidence no longer available or provided the Claimant with earlier medical care to prevent his injury from worsening. The Claimant suffers from a right rotator cuff tear to this day. Thus, the evidence they would seek undoubtedly still exists. They also have introduced no evidence suggesting that an earlier diagnosis would have averted the need for major surgery or an alternative treatment plan.

The Respondents correctly argue that they have no way of knowing the nature and extent, much less the causal mechanism of the Claimant's right shoulder injury. This is owing to no fault but their own. In the 10 months they had to prepare for this hearing, they could have inquired into a lack of medical documentation evidencing the Claimant's alleged pre-June 2005 "twinges," and they could have requested an IME to deduce substantial evidence rebutting a causal relationship between Claimant's injury and his employment. Simply stating that they could do neither is merely conclusory without showing *how* the untimely notice prevented them from doing so. *Id.*

The Claimant's Timely Claim for His Right Shoulder Injury Under Section 13

Similar to Section 12, Section 13 provides that a claim for a compensable injury must be filed within one year from the time the claimant becomes aware or should have been aware of the relationship between the injury and his employment by the exercise of reasonable diligence. 33 U.S.C. § 913(a). The standard of awareness is the same for Section 13 as for Section 12. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990). If the employer voluntarily pays compensation even without a benefits award, a claim may be filed within a year of the employee receiving the last payment. 33 U.S.C. § 913(a). A claim may take any written form so long as it shows intent to assert a right to compensation. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 169 (1998).

Since I have found in my discussion of Section 12 that the Claimant's right shoulder injury was the "natural and unavoidable" result of his left shoulder injury, for which the parties stipulated a timely claim was filed, I find that the claim is not time-barred pursuant to Section 13. Based on the Section 20(a) presumption, the left and right shoulder injuries are a single, causally related incident requiring only one timely filing. 33 U.S.C. § 913(a).

The Claimant's Entitlement to Section 14(e) Penalties

Section 14(e) of the Act provides a 10 percent penalty on benefits due to the claimant if the employer does not pay compensation within 14 days of being notified or gaining knowledge of the injury or does not controvert the claim within 14 days. 33 U.S.C. § 914(b), (d)-(e). An employer's knowledge of the injury, not receipt of the claim, triggers a duty to pay or controvert. *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37, 39 (1991). To escape a penalty under Section 14(e), an employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). The employer must file a notice of controversion within 14 days of becoming aware of a dispute. *Bonner*, 600 F.2d at 1295; *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981). This notice must include the names of the claimant and the employer, the date of the alleged injury, and the grounds upon which compensation is controverted. 33 U.S.C. § 914(d). An employer's Section 14(e) liability ceases on the date of the filing of the notice of controversion. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).

The Claimant asks for a 10 percent penalty on any partial disability benefits due to him from September 10, 2006, onward. He argues that the Respondents' September 21, 2006, notice of controversion explicitly suspended TTD because the Claimant returned to work but makes no mention of any other benefits that might come due. (RX 5, p. 10.) He concedes that the LS-207 would have defeated penalty liability had the document not specifically referenced TTD, but instead addressed disability benefits in general.

The Respondents counter that the notice of controversion was timely filed according to the statute's requirements. They cite case law granting employers liberty to formulate and to change their reasons for controverting benefits. The Board in *Pruner v. Ferma Corporation* held that "there is no requirement that the particular grounds upon which the claim is controverted be initially determined with precision." 11 BRBS 201, 209 (1979). The Board has recently elaborated that "a notice of controversion need not accurately reflect the basis for employer's controversion throughout the course of the proceedings." *Hitt v. Newport News Shipbuilding & Dry Dock Company*, 38 BRBS 47, 51 (2004). Notice to controvert which states a reason for controversion is sufficient to alert the DOL to a controversy between the parties. *Id.*

I reject the Claimant's request for penalties as contrary to the plain language of the statute and the purpose of the Act. The Claimant cites no case law suggesting that penalties are appropriate if an employer controverts a right to one form of benefits but not another. Nor does he provide any persuasive authority for extraneously parsing the clear intent contained in a notice of controversion. Furthermore, he concedes that had the Respondents used less precise language, penalties would not be at issue. As of September 21, 2006, the Respondents were paying TTD only. The Respondents believed that the Claimant's return to work was a valid reason to

controvert further benefit payments. Thus, the LS-207 was accurate when controverting exactly the benefits contemporaneously at issue, timely filed within two weeks of stopping payments, and drafted in accordance with the plain language requirements of the statute. 33 U.S.C. § 914(b), (d)-(e).

Both cases the Respondents cite involved employers altering their initial reasons for controverting claims and not questions of which types of disability benefits are being controverted. However, these cases indicate that the purpose behind Section 14(d) controversion requirements is not a rigorous refutation of benefits claims but a means of providing notice that the right to benefits is under dispute. Appropriately, the Board in *Pruner* could have been responding to our Claimant here when it reasoned, "Claimant would have employers penalized ten percent if they are unable to accurately investigate the injury, ascertain the facts, and construct a legal defense within two weeks of the injury." 11 BRBS at 209. The Respondents had insufficient evidence of the Claimant's wage-earning capacity to honestly and explicitly controvert partial disability benefits at that time. To hold that the Respondents' superfluous verbiage — inclusion of the term TTD when silence would have sufficed — renders them liable for penalties would negate the purpose of controversion in providing notice and does nothing to advance the impetus for the penalty scheme in compelling employers to either expeditiously pay benefits or make their disputes known.

CONCLUSION

The Claimant injured his left shoulder on June 4, 2002, and became totally disabled on September 23, 2002, when he had his first surgery. He reached MMI on November 23, 2004, and is permanently and partially disabled as of September 10, 2006, with respect to his left shoulder injury. He has successfully invoked the Section 20(a) presumption that his right shoulder injury arose out of and in the course of employment, and the Respondents have failed to rebut the presumption with substantial evidence. The Claimant has not yet reached MMI and is currently temporarily and partially disabled with respect to his right shoulder injury. Thus, the Claimant's right shoulder is deemed to have been injured on June, 4, 2002. The Claimant's AWW at the time of his June 4, 2002, injury was $572.75. The Respondents are liable for weekly TTD benefits of $381.67 from September 23, 2002, to September 9, 2006, and for weekly TPD benefits of $116.71 from September 10, 2006, until he reaches MMI or not to exceed five years. The Respondents are also liable for reasonable medical expenses associated with both shoulders. The Claimant's injuries are timely noticed and filed pursuant to Sections 12 and 13. Lastly, the Claimant's request for Section 14(e) penalties is denied.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

1. The Employer, Army Central Insurance Fund / NAF and Broadspire, its carrier, shall make payments to the Claimant for his temporary total disability from September 23, 2002, to September 9, 2006, based on his AWW of $572.75 per week.

2. The Employer, Army Central Insurance Fund / NAF and Broadspire, its carrier, shall make payments to the Claimant for his temporary partial disability beginning September 10, 2006, based on his inflation-adjusted wage-loss of $176.83 per week.

3. Army Central Insurance Fund / NAF and Broadspire shall pay for any reasonable medical care necessary to treat the Claimant's shoulder injuries.

4. Army Central Insurance Fund / NAF and Broadspire shall reimburse the Claimant for all medical expenses incurred in relation to his injuries.

5. Army Central Insurance Fund / NAF and Broadspire shall receive credit for disability compensation benefits that they previously paid to the Claimant for his injuries.

6. Army Central Insurance Fund / NAF and Broadspire shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961 and 33 U.S.C. § 914(e).

7. All computations are subject to verification by the District Director who, in addition, shall make all calculations necessary to carry out this Order.

8. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondent's counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for the employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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JENNIFER GEE
Administrative Law Judge